Supreme Court, U.S.
FILED
JAN 28 1998
CLERK

No. 97-1074

In The

Supreme Court of the United States

October Term, 1997

PETER VERNIERO, Attorney General of New Jersey, *et al.*,

Petitioners,

vs.

W.P., *et al.*, Individually and as Representatives of a Class Pursuant to Fed. R. Civ. P. 23(a) and 23(b)(2),

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF PETITIONERS IN OPPOSITION TO RESPONDENTS' CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

MICHAEL Z. BUNCHER
EDWARD L. BAROCAS
New Jersey Office of the
Public Defender
Special Hearings Unit
R.J. Hughes Justice Complex
P.O. Box 850
Trenton, New Jersey 08625
(609) 292-7677

JOHN J. GIBBONS
Counsel of Record
LAWRENCE S. LUSTBERG
KERRIE R. HESLIN
GIBBONS, DEL DEO, DOLAN,
GRIFFINGER & VECCHIONE, P.C.
One Riverfront Plaza
Newark, New Jersey 07102-5497
(973) 596-4500

Attorneys for Petitioners

144437

(800) 274-3321 • (800) 359-6859
A DIVISION OF COUNSEL PRESS

Lutz Appellate Services, Inc.

QUESTIONS PRESENTED

1. Whether the court of appeals' decision, that the Due Process Clause of the United States Constitution requires the State to bear the burden of proof at a hearing under Megan's Law and establish by clear and convincing evidence the relative degree of risk of reoffense which determines the classification of the sex offender, conflicts with the New Jersey Supreme Court's decision in *Doe v. Poritz*, 662 A.2d 367 (N.J. 1995).

2. Whether a liberty interest recognized by the Supreme Court of New Jersey as arising under the New Jersey Constitution is protected by the federal Due Process Clause as are other state-created liberty interests.

STATEMENT

Petitioners here oppose the Conditional Cross-Petition for a Writ of Certiorari (hereinafter "Cross-Petition") seeking limited review of the decision of the United States Court of Appeals for the Third Circuit in *E.B. v. Verniero*, 119 F.3d 1077 (3d Cir. 1997), Appendix B ("App. B") to the Petition for a Writ of Certiorari. In *E.B.*, the court of appeals concluded that the Due Process Clause of the Fourteenth Amendment of the Constitution requires that, under Megan's Law, the State bear the burden of proving by clear and convincing evidence the relative degree of risk of reoffense, based upon which the extent of notification is determined. App. B at 80a. Respondents now Cross-Petition, contending that the court of appeals' decision stands in conflict with the decision of the Supreme Court of New Jersey in *Doe v. Poritz*, 662 A.2d 367 (N.J. 1995), and that, in any event, federal due process guarantees are not triggered by state law deriving from a state constitution.

The Cross-Petition must be denied. First, the New Jersey Supreme Court has recently amended its decision in *Doe v. Poritz* to eviscerate any conflict with the court of appeals' decision. Second, the issue of whether the state constitution can give rise to liberty interests which trigger federal due process protection was not raised or argued below, and cannot be properly reviewed by this Court. Nor, finally, can respondents provide any case law to support their legal argument that a state constitution cannot give rise to a liberty interest for purposes of federal due process analysis, or indicate a conflict among the lower courts with respect to this issue.

REASONS FOR DENYING THE WRIT

I. The Decision Of The Court Of Appeals Is Not In Conflict With The New Jersey Supreme Court's Holding In *Doe v. Poritz*.

Respondents first argument in support of their Cross-Petition for review of the court of appeals' decision is that there is a conflict between the decision of the court of appeals in *E.B.* and the New Jersey Supreme

Court's holding in *Doe v. Poritz*. This argument is without basis, and must be rejected.

Specifically, after the court of appeals concluded that the federal Due Process Clause requires the State to carry the burden of proof at a Megan's Law hearing by clear and convincing evidence, App. B at 80a, the New Jersey Supreme Court effectively amended its decision in *Doe v. Poritz* to provide for this federal guarantee. In an Order, dated December 9, 1997, attached hereto as Appendix 1 ("App. 1"), the New Jersey Supreme Court officially amended the procedure for hearings on Tier 2 and Tier 3 classifications under Megan's Law. The procedures created by the New Jersey Supreme Court, and now being applied in practice, provide that "[a]t the hearing, the prosecutor has the burden of persuasion by clear and convincing evidence as to both tier classification and the manner of notification." App. 1 at 7a. Moreover, the state court not only prospectively altered the State's burden of proof, but provided a procedure whereby previously classified individuals could request a redetermination utilizing this burden and standard of proof. App. 1 at 9a, 14a. These amendments render the procedures attendant to Megan's Law, and the court's decision in *Doe v. Poritz*, entirely consistent with the court of appeals' holding that the federal Due Process Clause requires the State to bear the burden of proof by clear and convincing evidence.

The New Jersey Supreme Court's Order, amending its prior decisional law, does not assert that the resulting procedural changes are temporary or contingent on the outcome of this case. In sum, then, there now exists no conflict between the decisions of the Supreme Court of New Jersey and the United States Court of Appeals for the Third Circuit. Accordingly, respondents' Cross-Petition must be denied.

II. Respondents' Cross-Petition Must Be Denied Because The Issues Raised Therein Were Not Presented To The Lower Courts And Are Not Supported By Any Case Law Or The Subject Of Conflicting Lower Court Decisions.

A. The Question of Whether Liberty Interests Arising Under A State Constitution Are Protected By The Due Process Clause Of The United States Constitution Was Not Raised Or Argued Below.

In their Cross-Petition, respondents argue, for the first time, that a liberty interest created by a state constitution is not afforded protection under the federal Due Process Clause. In both the district court and the court of appeals, petitioners asserted that the procedures set forth under Megan's Law did not provide the minimum protections required under the federal Due Process Clause. The only argument respondents asserted in opposition to petitioners' due process challenge concerned the proper burden of proof to be carried by the State at a Megan's Law hearing. Because their current contention, that the Due Process Clause of the Fourteenth Amendment to the United States Constitution does not protect liberty interests arising under a state constitution, has not been briefed, argued or decided below, it is not appropriately raised at this time. *See Yee v. City of Escondido, Cal.*, 503 U.S. 519, 532-33 (1992) (declining to review petitioners' substantive due process challenge to ordinance because it was not raised or addressed below); *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989) (refusing to review petitioners' due process challenge to state statute because argument was not briefed or raised in lower courts). Respondents' Cross-Petition should accordingly be denied.

B. There Is No Precendential Support Or Conflict In The Lower Courts Which Supports Respondents' Argument That Only Statutorily-Created Rights Are Afforded Protection By The Federal Due Process Clause.

The Cross-Petition should also be denied because respondents' argument, that the federal Due Process Clause extends only to

statutorily-created liberty interests but not to liberty interests created by a state's constitution, is without support in the law. Nor is it the subject of conflicting lower court opinions.

It is well-settled that liberty interests "may arise from two sources — the Due Process Clause itself and the laws of the States." *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 460 (1989) (quoting *Hewitt v. Helms*, 459 U.S. 460, 466 (1983)); *see also Sandin v. Conner*, 515 U.S. 472, 483 (1995). The "laws of the States," in turn, include not only statutes, as respondents contend, *see* Cross-Petition at 16, but also regulations, administrative practices, contractual arrangements, or other mutual understandings, *see, e.g., Sandin*, 515 U.S. at 474, and even the common law, *see Mills v. Rogers*, 457 U.S. 291, 303 (1982).

Respondents here assert, however, that relevant state law does not include a state constitution or judicial interpretations thereof. Neither this Court, nor any lower court, has drawn this distinction. Instead, state constitutions have been consistently viewed as a source of liberty interests for purposes of both substantive and procedural due process analyses, *see Cruzan v. Director of Mo. Dep't of Health*, 497 U.S. 261, 277 (1990); *Montero v. Meyers*, 13 F.3d 1444, 1448 (10th Cir.), *cert. denied*, 513 U.S. 888 (1994), as well as for other constitutional inquiry. *See Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 79 (1980) (holding that state constitutional provisions are equivalent to state statutes for purpose of determining whether law is repugnant to laws of the state under 28 U.S.C. § 1257).

The New Jersey Supreme Court, in *Doe v. Poritz*, 662 A.2d at 412, expressly found that the State Constitution provided petitioners with a right to privacy that gives rise to a liberty interest. The court of appeals, properly deferring to the state court's interpretation of its own law, *see Schad v. Arizona*, 501 U.S. 624, 636 (1991), appropriately held that petitioners could not, therefore, be deprived of that right to privacy without cause, *i.e.*, "a showing of an overriding state interest." App. B at 66a. Utilizing well-established methodology for determining what process is then due, the court of appeals correctly concluded that the State must bear the burden of persuasion, by clear and convincing evidence, in order to establish this interest. App. B at 98a-80a.

Respondents' belated challenge to this unassailable holding should be rejected and their Cross-Petition should be denied.

CONCLUSION

For the reasons stated above, petitioners respectfully request that the Conditional Cross-Petition for a Writ of Certiorari be denied.

Respectfully submitted,

JOHN J. GIBBONS
Counsel of Record
LAWRENCE S. LUSTBERG
KERRIE R. HESLIN
GIBBONS, DEL DEO, DOLAN,
GRIFFINGER & VECCHIONE, P.C.
One Riverfront Plaza
Newark, New Jersey 07102-5497
(973) 596-4500

MICHAEL Z. BUNCHER
EDWARD L. BAROCAS
New Jersey Office of the
Public Defender
Special Hearings Unit
R.J. Hughes Justice Complex
P.O. Box 850
Trenton, New Jersey 08625
(609) 292-7677

Attorneys for Petitioners

APPENDIX

APPENDIX 1 — ORDER OF THE SUPREME COURT OF NEW JERSEY DATED DECEMBER 9, 1997

SUPREME COURT OF NEW JERSEY

IN THE MATTER OF AMENDMENT TO PROCEDURE FOR HEARINGS ON OBJECTIONS TO MEGAN'S LAW TIER 2 AND TIER 3 CLASSIFICATION AND MANNER OF NOTIFICATION DETERMINATION

ORDER

The Court, on the application of the Attorney General, having issued an Order on September 10, 1997, amending procedures applicable to tier classification and notification determinations under the Registration and Community Notification Laws, *N.J.S.A.* 2C:7-1 to -11, (Megan's Law),

And the Court having directed that the October 23, 1995, "Outline of Procedure for Hearings on Objections to Megan's Law Tier 2 and 3 Classification and Manner of Notification Determinations" (Outline of Procedure), together with notice and application forms, be revised to comply with the Court's Order of September 10, 1997,

And the Court having duly considered the revised Outline of Procedure and having determined that it complies with the Court's Order of September 10, 1997,

And good cause appearing;

IT IS ORDERED that as revised, the appended Outline of Procedure is adopted, to be effective immediately.

For the Court,
s/ illegible
Acting C.J.

Dated: December 9, 1997

Appendix 1

Outline of Procedure for Hearings on Objections to Tier 2 or Tier 3 Classification and Manner of Notification Determinations under the Registration and Community Notification Laws (Megan's Law)

Adopted as Revised
December 9, 1997
Supreme Court of New Jersey

Appendix 1

* * *

CASES NOT YET DISPOSED OF OUTLINE OF PROCEDURE FOR HEARINGS ON OBJECTIONS TO TIER 2 OR TIER 3 CLASSIFICATION AND MANNER OF NOTIFICATION DETERMINATIONS

I. The court shall render its tier classification and manner of notification determination within 45 days of the date of the notice to the registrant, except as provided in VI.C.7. below.

II. Personal service of the Notice shall be made by a designee or employee of the prosecutor not having a direct interest in the tier classification or manner of notification.

III. Because the Supreme Court decision allows registrant 14 days to object to tier 2 or tier 3 classification and manner of notification (see IV below), all steps necessary to comply with that 14 day time frame shall be expedited.

A. Registrant shall be informed that he or she has five days from receipt of the Notice to request assigned counsel on the basis of indigence. (Registrant has 14 days to decide to object.)

1. The decision as to indigence and appointment of counsel shall be made within two days of registrant's request.

B. The prosecutor, prior to preparation of the Notice, shall consult with the judge designated in that vicinage to hear Megan's Law cases to set the date for a conference,

which shall be held between twenty-one and twenty-four days from the date of anticipated service of the Notice. The conference date shall be included in the Notice.

C. Attorney for registrant may request discovery at any time after the registrant's receipt of Notice of tier 2 or tier 3 classification.

1. Discovery is to be made available within two working days either of registrant's request or of notice to the prosecutor that registrant has retained or been assigned counsel.

a. "Made available" means available for pick up, unless specific arrangements for mailing are made by counsel for the registrant.

b. Discovery is defined as "all papers, documents, and other materials compiled for the purpose of the prosecutor's review."

c. Notwithstanding, any rule, regulation, or policy of confidentiality, the registrant shall have the right to inspect and copy all papers, documents, and other materials compiled for purposes of the prosecutor's review or which were relied on by the prosecutor in determining the registrant's tier classification or the manner of notification, and any other records relating to the registrant's mental or physical condition that may be maintained by other agencies or entities.

d. The prosecutor, or the custodian of any such records, may request an in camera judicial

inspection of such records to determine whether there exits a continued need for confidentiality or whether disclosure should be withheld to require sanitization based on the need for confidentiality.

IV. Objections either to tier 2 or tier 3 classification or to the manner of notification are required to be filed as follows within 14 calendar days of receipt of the Notice from the prosecutor:

A. Filed with the Designated Judge for hearing Megan's Law objections, including therewith a copy of the prosecutor's findings and statement of reasons.

B. Filed with the prosecutor on the same date as the filing with the Designated Judge.

V. On the registrant's filing of any such objection, discovery shall be made available within two working days of prosecutor's receipt of that objection, if it has not previously been provided.

A. A copy of any such discovery shall also be provided to the Court.

VI. Conference

A. Registrant should be allowed to attend the conference (even if the registrant is incarcerated).

B. At the conference, registrant and the prosecutor shall be prepared to discuss the following:

Appendix 1

1. Settlement possibilities

2. Discovery issues, if any

   a. The parties should be encouraged to attempt to resolve discovery disputes before the conference.

3. Issues in the case

   a. Counsel for the registrant must identify those factors to which exception will be taken; this may be done in advance of the conference.

4. The need for the prosecutor to retain an expert to examine the registrant

5. Identities of any experts

6. Availability of those experts for a hearing

7. Identification of documents

8. Scheduling of a hearing, if necessary.

C. At the conference, the judge should:

   1. Encourage settlement discussions

   2. Render a final decision if the judge determines that a final disposition can be made without a further hearing.

   3. Resolve discovery issues

4. Determine the need for experts

5. Determine the necessity for and nature of any hearing, including

   a. What issues need to be resolved

   b. What issues can be decided on non-testimonial submissions

   c. What issues require testimony and by whom, with specific focus on whether expert testimony will be necessary

   d. Set the schedule for any non-testimonial submissions, with such submissions to be filed in advance of the hearing date

6. Registrant must be allowed to address the court.

7. Set date for hearing, which should be between 10 and 14 days from date of conference, except that (a) the time frame may be shorter if all parties agree, or (b) it may be longer for good cause shown, but no longer than 45 days from the date of conference.

VII. Conduct of hearing

A. The hearing shall be *in camera*

B. Evidential burden

1. At the hearing, the prosecutor has the burden of persuasion by clear and convincing evidence as to both tier classification and the manner of notification.

2. The judge's determination that the burden of persuasion has been met and justifies the classification and the manner of proposed notification shall be supported by findings of fact and statement of reasons. See VIII, below.

C. Although the rules of evidence do not apply in the hearing, the judge shall consider evidence that is "relevant and trustworthy." *See R.* 3:21-4, Comment 1. The judge may also consider information from the application for review form, as completed by the registrant, including any objection filed pursuant to IV, above, but neither the registrant's statement of objections and statement of reasons nor the absence of same shall be used against the registrant as admissions or otherwise.

D. The judge shall make a final determination at the conclusion of the hearing.

VIII. In all cases, the judge's final determination, including those based on registrant's default, shall contain express findings of fact based on the standard of clear and convincing evidence that support the judge's conclusion that the State either has or has not met its burden of persuasion both as to tier classification and manner of notification; such findings shall also be specifically included or expressly incorporated by reference in the final order.

IX. Subject to any applicable stay or injunctive order, all orders authorizing notification shall contain a provision that they do not become effective until the expiration of two full business days from the date of the final order.

Appendix 1

CASES PREVIOUSLY DISPOSED OF OUTLINE OF PROCEDURE FOR REDETERMINATION OF TIER 2 AND TIER 3 CLASSIFICATION AND MANNER OF NOTIFICATION DETERMINATIONS

I. The court shall render its tier classification and manner of notification determination within 45 days of the date of the notice of the registrant, except as provided in VII.C.7. below.

II. Personal service of the Notice shall be made by a designee or employee of the prosecutor not having a direct interest in the tier classification or manner of notification.

III. The procedure for redetermination for registrants whose cases were originally determined by default, or whose cases were not the subject of a final order, shall be governed by I-XI of this Outline of Procedure. The redetermination procedure for registrants whose cases were determined after a conference or hearing shall be governed by I-III and IX-XVIII of this Outline of Procedure.

IV. Because the Supreme Court decision allows registrant 14 days to object to tier 2 or tier 3 classification and manner of notification (see V below), all steps necessary to comply with that 14 day time frame shall be expedited.

A. Registrant shall be advised that he or she has five days from receipt of Notice to request assigned counsel on the basis of indigence. (Registrant has 14 days to decide to object.)

1. The decision as to indigence and appointment of counsel shall be made within two days of registrant's request.

Appendix 1

B. The prosecutor, prior to preparation of the Notice, shall consult with the judge designated in that vicinage to hear Megan's Law cases to set the date for a conference, which shall be held between twenty-one and twenty-four days from the date of anticipated service of the Notice; the conference date shall be included in the Notice.

C. Attorney for registrant may request discovery any time after registrant's receipt of notice of tier 2 or tier 3 classification.

1. Discovery is to be made available within two working days either of registrant's request or of notice to the prosecutor that registrant has retained or been assigned counsel.

a. "Made available" means available for pick up, unless arrangements for mailing are made by counsel for registrant.

b. Discovery is defined as "all papers, documents and other materials compiled for the purpose of the prosecutor's reviews."

c. Notwithstanding, any rule, regulation or policy of confidentiality, the registrant shall have the right to inspect and copy all papers, documents and other materials compiled for the purpose of the prosecutor's review or which were relied on by the prosecutor in determining the registrant's tier classification or the manner of notification, and any other records relating to the registrant's mental of physical condition that may be maintained by other agencies or entities.

Appendix 1

d. The prosecutor, or the custodian of any such records, may request an in camera judicial inspection of such records to determine whether there exists a continued need for confidentiality or whether disclosure should be withheld to require sanitization based on confidentiality.

V. Objection either to tier 2 or tier 3 classification or the manner of notification are required to be filed as follows within 14 calendar days of receipt of the Notice from the prosecutor:

A. Filed with the Designated Judge for hearing Megan's Law objections, including therewith a copy of the prosecutor's findings and statement of reasons.

B. Filed with the prosecutor on same date as the filing with the Designated Judge.

VI. On the registrant's filing of any such objection, discovery shall be made available within two working days of prosecutor's receipt of that objection, if it has not previously been provided.

A. A copy of any such discovery shall also be provided to the Court.

VII. Conference

A. Registrant should be allowed to attend the conference (even if the registrant is incarcerated.)

B. At the conference, registrant and the prosecutor shall be prepared to discuss the following:

Appendix 1

1. Settlement possibilities

2. Discovery issues, if any

    a. The parties should be encouraged to attempt to resolve discovery disputes before the conference.

3. Issues in the case

    a. Counsel for the registrant must identify those factors to which exception will be taken; his may be done in advance of the conference.

4. The need for the prosecutor to retain an expert to examine the registrant

5. Identities of any experts

6. Availability of those experts for a hearing

7. Identification of documents

8. Scheduling of hearing, if necessary.

C. At the conference, the judge should:

1. Encourage settlement discussions

2. Render a final decision if the judge determines that a final disposition can be made without a further hearing

3. Resolve discovery issues

4. Determine the need for experts

5. Determine the necessity for and nature of any hearing, including

   a. What issues need to be resolved

   b. What issues can be decided on non-testimonial submissions

   c. What issues require testimony and by whom, with specific focus on whether expert testimony will be necessary

   d. Set the schedule for any non-testimonial submissions, with such submissions to be filed in advance of the hearing date

6. Registrant must be allowed to address the court.

7. Set date for hearing, which should be between 10 and 14 days from date of conference, except that (a) the time frame may be shorter if all parties agreed, or (b) it may be longer for good cause shown, but no longer than 45 days from the date of conference.

VIII. Conduct of hearing

A. The hearing shall be *in camera*

Appendix 1

B. Evidential burden

1. At the hearing, the prosecutor has the burden of persuasion by clear and convincing evidence as to both tier classification and manner of notification.

2. The judge's determination that the burden of persuasion has been met and justifies the proposed classification and the manner of notification shall be supported by findings of facts and statement of reasons. See X, below.

C. Although the rules of evidence do not apply in the hearing, the judge shall consider evidence that is "relevant and trustworthy." *See R.* 3:21-4, Comment 1. The judge may also consider information from the application for review form, as completed by the registrant, including an objection filed pursuant to IV, above, but neither the registrant's statement of objections and statement of reasons nor the absence of same shall be used against the registrant as admission or otherwise.

D. The judge shall make a final determination at the conclusion of the hearing.

IX. Where a registrant has moved to a new county after the original conference\hearing was held, the Redetermination Notice will be sent by the prosecutor of the new county of residence. All further proceedings shall be conducted by the designated judge in the current county of residence.

X. In redetermination cases where the registrant originally defaulted, or where a final order has not been entered or

where the registrant has defaulted after notice of opportunity for a redetermination, the judge's final redetermination shall contain express findings of fact based on the standard of clear and convincing evidence that support the judge's conclusions that the State either has or has not met its burden of persuasion both as to tier classification and manner of notification; such findings shall also be specifically included or expressly incorporated by reference in the final order. In redetermination cases, where the registrant defaults after notice of opportunity or redetermination or does not seek a redetermination, the transcript of any previous conference or hearing in the original determination proceeding need not be ordered unless the judge determines it is necessary for a fair and complete redetermination.

XI. Subject to any applicable stay or injunctive order, all orders authorizing notification shall contain a provision that they do not become effective until the expiration of two full business days subsequent to the date of the execution of the order.

XII. The "Notice of Opportunity for Redetermination of Classification and Manner of Notification" sent by the prosecutor to the registrant shall contain a copy of the court's order, together with a copy of the Registrant Risk Assessment Scale, as amended at the conference or hearing.

XIII. The registrant shall be given 14 days to decide whether to seek a redetermination of classification and manner of notification. If the registrant decides to seek redetermination, he or she may provide any supplemental

material to be considered by the court within 28 days of the date of the "Notice of Opportunity for Redetermination of Classification and Manner of Notification". If the judge decides that the redetermination may be based on a *de novo* hearing on the existing record, the date of that hearing shall occur no later than 42 days from the date of the "Notice of Opportunity for Redetermination of Classification and Manner of Notification".

XIV. If, in the original proceedings, registrant was represented by pro bono counsel, said counsel shall continue to represent registrant in all redetermination proceedings, except if the court decides that a final plenary hearing is necessary in order to redetermine registrant's tier classification and manner of notification. Former *pro bono* counsel shall continue to represent registrant (1) to determine whether to seek a redetermination and to present to the court with any supplemental material the registrant is asking that the judge consider and (2) and in those cases in which the judge decides that redetermination can be based on a *de novo* hearing on the existing record or as that record may be supplemented by relatively minor submissions. The court, on motion of former pro bono counsel, shall relieve counsel of any further obligation to represent registrant and shall appoint an attorney from the public defender's special hearings unit to represent the registrant, if the court decides that the redetermination of tier classification and manner of notification requires extensive supplementation of the existing record or should be based on a full plenary hearing.

XV. The judge who conducted the original conference\hearing shall conduct all proceedings for redetermination unless that judge is unavailable in which event the

redetermination proceedings shall be undertaken by the designated judge.

XVI. The judge may, after a *de novo* hearing on the record, render a final redetermination. Any redetermination based on a *de novo* hearing on the existing record shall include material contained in the original case file and transcripts of proceedings in the case or agreed statements of facts in lieu thereof, together with any supplemental non-testimonial material provided by the prosecutor or registrant that the judge determines to be probative.

If the judge determines that a final redetermination cannot be rendered on the existing record even as supplemented, and that additional testimonial evidence is required to supplement the record, the judge shall schedule the case for a plenary hearing to admit such additional testimonial evidence, which shall be considered together with the existing record, as supplemented, as a basis for final redetermination.

If the judge determines that the existing record, even as supplemented, is insufficient or inadequate and that a full plenary hearing is necessary in order to render a fair and complete redetermination of registrant's tier classification and manner notification, the date of that hearing shall be set for no later than 14 days from the initial hearing date, unless circumstances warrant a relaxation of that time period. The conduct of the plenary hearing shall be governed by VIII above. The record developed by such a plenary hearing shall constitute the basis for redetermination.

XVII. In redetermination cases, where the original disposition was rendered after a conference or hearing, the judge's

final redetermination, whether based on a *de novo* hearing on the existing record or on the existing record as supplemented by non-testimonial and/or testimonial evidence, or based on a full plenary hearing, shall contain express findings of fact under the standard of clear and convincing evidence that support the judge's conclusion that the State either has or has not met its burden of persuasion both as to tier classification and manner of notification; such findings shall also be specifically included or expressly incorporated by reference in the final order.

XVIII. Subject to any applicable stay or injunctive order, all orders authorizing notification shall contain a provision that they do not become effective until the expiration of two full business days subsequent to the date of the execution of the order.